No. 95-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF COLORADO AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit membership corporation with nearly 300,000 members throughout the United States. The ACLU of Colorado is one of its state-wide affiliates. For more than

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[1] Letters from counsel for each of the parties consenting to the filing of this *amicus* brief have been submitted to the Clerk of the Court.

75 years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election laws. The ACLU also participated as *amicus curiae* in *California Medical Association* v. *FEC*, 453 U.S. 182 (1981); *Common Cause* v. *Schmitt*, 455 U.S. 129 (1982); *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Meyer* v. *Grant*, 486 U.S. 414 (1988); and *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws. *See, e.g., Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

STATEMENT OF THE CASE

From the early days of our Republic, political parties have spearheaded public debate about the statements and actions of elected officials. Following that tradition, the Colorado Republican Federal Campaign Committee (the "Colorado Republicans") in the spring of 1986 sponsored three radio advertisements criticizing statements by Democratic Congressman Tim Wirth. When the advertisements aired, Wirth already had indicated his intent to seek the Democratic Party's nomination for the open U.S. Senate seat from Colorado that would be filled in the general

election that November. As of their air dates, however, neither the Democrats nor the Colorado Republicans had nominated a candidate for the Colorado Senate seat.

One of the three advertisements sponsored by the Colorado Republicans, entitled "Wirth Facts #1," stated in full:

> "Paid for by the Colorado Republican State Central Committee
>
> "Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts." J.A. 161.

Consistent with the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-456 ("FECA"), the Colorado Republicans ensured that donated funds supporting the anti-Wirth advertising did not come from corporations or unions. They accepted contributions of no more than $5,000 per contributing individual. Moreover, in their filings with the Federal Election Commission ("FEC") under FECA, the Colorado Republicans publicly disclosed the identities of donors and listed the $15,000 cost of Wirth Facts #1 and other

anti-Wirth advertising as an expense for "Voter Information to Colorado Voters — Advertising."

On June 12, 1986, the Colorado Democratic Party ("Colorado Democrats") complained to the FEC, alleging that the Colorado Republicans' expenditures on anti-Wirth radio messages and pamphlets violated § 441a(d)(3) of FECA, which imposes dollar limits on expenditures a national or state party can make in connection with the general election campaign of candidates for Federal office.[2] Accepting the Colorado Democrats' position as it relates to Wirth Facts #1, the FEC subsequently sued the Colorado Republicans, contending that the spending on Wirth Facts #1, when aggregated with the Colorado Republicans' other spending, exceeded the limit imposed on party-committee spending by § 441a(d)(3).

The United States District Court for Colorado rejected the FEC's position. J.A. 17. Holding that political parties (unlike bank, corporate or union political action committees) are incapable of making "independent expenditures," *see FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 n.1 (1981) ("*DSCC*"), the district court found that the anti-Wirth publicity was a "coordinated expenditure." J.A. 22-23.[3] But, following this Court's interpretation of the phrase in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the court found that the Colorado Republicans' payments for Wirth Facts #1 were not payments "in connection with the general election campaign" because the radio spot did not "expressly advocate" the election or defeat of a candidate. J.A. 25-31.[4] Accordingly, the court held that the payments were not reportable under § 441a(d)(3).

[2] Section 441a(d)(3) limits expenditures by the national committee of a political party or a state committee of a political party (including any subordinate committee of a state committee) "in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party." The limitation, in the case of a candidate for election to the office of Senator, is the greater of (i) 2 cents times the voting age population of the state or (ii) $20,000. Section 441a(d)(3)'s two-cents-per-voting-age-population figure is adjusted each election cycle for inflation. 2 U.S.C. § 441a(c).

The United States Court of Appeals for the Tenth Circuit reversed. Even though the court acknowledged that Wirth Facts #1 did not constitute "express advocacy" under *Buckley* or *MCFL*, the panel ruled that the Colorado Republicans' spending for Wirth Facts #1 was reportable under § 441a(d)(3) as an expenditure "in connection with the general election campaign" because the radio spot "named both a clearly

[3] A "coordinated" expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley* v. *Valeo*, 424 U.S. 1, 47 n.53 (1976). Coordinated expenditures are considered "contributions." 2 U.S.C. § 441a(a)(7)(B)(i). An "independent" expenditure is one "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

The district court felt itself constrained by this Court's decision in *Buckley* and by the FEC's interpretation of FECA to hold the Colorado Republicans' expenditure to be "coordinated" because "[i]t was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated." J.A. 23.

[4] The Court has defined "express advocacy" to mean "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52; *accord MCFL*, 479 U.S. at 249.

identified candidate and contained an electioneering message." J.A. 44-45 & n.10.

The Court of Appeals did not confront the overbreadth and vagueness concerns that led this Court to construe other "in connection with" language in FECA to require "express advocacy." In a remarkable piece of circular reasoning, the court suggested that it considered such a narrow construction of § 441a(d)(3) not to be required by the First Amendment because political contributions are more susceptible to regulation than independent expenditures. J.A. 39-41, 43-44.

The Court of Appeals articulated what it apparently considers to be the test for an "electioneering message":

> "Any reasonable reading of 'Wirth Facts #1,' which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee. 'Wirth Facts #1' unquestionably contained an electioneering message." J.A. 45.

The Tenth Circuit dismissed the Republican Party's contention that it would violate the First Amendment to subject the spending for Wirth Facts #1 to the limit imposed by § 441a(d)(3). Noting that the "coordinated expenditures" permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as "contributions from the political committee to the candidate," the Court of Appeals held that "[t]he same reasoning" used by this Court to uphold other contribution limitations applies to the limits on "coordinated expenditures" by a political party. J.A. 47.

Applying that reasoning, the court upheld the political party spending limitation as "a permissible burden on speech and association." J.A. 46. The court held that § 441a(d)(3) serves (1) to protect against "domination" of party spending choices by incumbent officeholders who may hold a party's purse strings, J.A. 47, and (2) to preclude party committees from securing (or appearing to secure) a political *quid pro quo* from current or potential office holders, J.A. 48. The court also suggested that the expenditure limitation was justified under *Buckley* as a means of equalizing the relative ability of all citizens to affect the outcome of elections and as a means of capping campaign costs "to a degree" and thereby increasing accessibility to our political system. J.A. 48.

SUMMARY OF ARGUMENT

1. Section 441a(d)(3) impermissibly discriminates against parties. Political parties are the *only* political groups that do not enjoy the right to spend unlimited amounts on campaign-related speech. This is the result of a constitutionally indefensible Catch-22. On the one hand, party and candidate are deemed by operation of law to be so inextricably linked that party spending cannot be "independent" of the candidate, and thus free from spending limitations. On the other hand, party and candidate also are deemed to be sufficiently separate that party spending on a candidate's behalf can be treated as a "contribution" to the candidate, and thus subject to spending limitations. If, as we maintain, party and candidate are one and the same, parties should be free from the campaign spending limitations that apply to "contributions." If party and candidate are viewed as separate, however, parties should be allowed to make unlimited expenditures if those expenditures are not coordinated with the candidate.

2. Even if a party's expenditures on behalf of a candidate are viewed as "contributions" to the candidate, § 441a(d)(3) violates the First Amendment because it does not serve to prevent corruption or the appearance of corruption — the only governmental interests thus far identified as sufficiently compelling to justify restricting political organizations' campaign finances. A political party cannot "corrupt" its own candidates by spending to get them elected, even if the spending is controlled by the candidate. Such spending does not present any of the dangers that this Court has held may justify limitations on political spending. The other interests suggested as justifications for § 441a(d)(3) by the Tenth Circuit — equalizing the relative ability of all citizens to affect the outcome of elections and capping campaign costs — in fact have been rejected by this Court as justifications for spending limitations.

3. Even if some election-related speech by a political party might constitutionally be limited to prevent "undue" or "improper" influence, § 441a(d)(3), as construed by the Tenth Circuit, is both overbroad and impermissibly vague. It is overbroad because the standard announced by the Tenth Circuit in theory could encompass virtually all speech regarding a current or would-be officeholder. It is impermissibly vague because one simply cannot know in advance whether particular messages will be deemed to be "electioneering messages."

ARGUMENT

I. THE SPENDING LIMITATION IMPOSED BY 2 U.S.C. § 441a(d)(3) IMPERMISSIBLY DISCRIMINATES AGAINST POLITICAL PARTIES AS SPEAKERS.

It is axiomatic that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) (citation omitted). Section 441a(d)(3) impermissibly discriminates against political parties as speakers, subjecting them to spending limits applicable to no other political group. Under any standard of review, this discrimination renders § 441a(d)(3) invalid under the First Amendment.[5/]

Political parties are the *only* political groups that do not enjoy the right to spend unlimited amounts on campaign-related speech. Other political groups are permitted to make unlimited "independent expenditures" in support of (or in opposition to) candidates. But because parties are deemed to

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5/ The distinction between political parties and other speakers drawn by § 441a(d)(3) is distinguishable from the distinction between cable programmers and broadcasters created by the must-carry rules addressed in *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994). In *Turner*, this Court declined to presume that the must-carry rules were invalid even though they distinguished between cable operators and broadcasters. *See id.* at 2460-61. Unlike the situation here, the must-carry rules discriminated against a *medium of speech*, because the distinction that the rules imposed was "based only upon the manner in which speakers transmit their messages to viewers." *Id.* at 2460. *Political parties themselves* are the targets of § 441a(d)(3), because the expenditure limitation burdens parties regardless of what medium of communication a party uses to express its support for its candidates.

be incapable of making "independent expenditures," their expenditures are automatically treated as "contributions" to the party's own candidates (whether or not its candidates have even been selected), and therefore as subject to contribution limitations.

The result is a First Amendment double-whammy. All party expenditures "in connection with" a general election campaign may be limited (not just expenditures that are in fact "coordinated" with a candidate), because all party expenditures are deemed to be "contributions" as a matter of law. And, because all party expenditures on a candidate's behalf are regulable as "contributions," the Tenth Circuit held that expenditures for party speech can be restricted (as expenditures "in connection with" a general election campaign) even if the speech does not expressly advocate the election or defeat of any candidate but merely contains an "electioneering message."

There is no justification for treating a political party as distinct from the candidates it fields for office, and for characterizing its spending on behalf of its candidates as the equivalent of "contributions." The party *is* the candidate, and *vice-versa*. Spending by a party on behalf of its candidates is the functional equivalent of an expenditure by the candidate and may no more be restricted than any other expenditures by the candidate.

In any event, the government's approach to party spending is both unfair and unjustifiable. The government cannot simultaneously treat party and candidate as so *indistinguishable* that party expenditures on behalf of the candidate cannot be considered independent of the candidate, and yet as sufficiently *distinct* that party expenditures on behalf of the candidate may be regulated as party contributions *to* the candidate.

If party and candidate are one and the same for campaign spending purposes, then all party expenditures *on behalf of* the candidate should be treated as expenditures *by* the candidate — and hence as subject to no limitation. *See Buckley*, 424 U.S. at 54-58. If, however, party and candidate are deemed sufficiently distinct that the party may make "contributions" to the candidate, then the party ought to be able to make unlimited expenditures if the expenditures in fact are not "coordinated" with the candidate. In either case, the party, like other political groups, ought to be able to make unlimited expenditures.

II. ANY LIMITATION ON WHAT A POLITICAL PARTY MAY SPEND ON CAMPAIGN-RELATED SPEECH VIOLATES THE FIRST AMENDMENT.

In *Buckley*, this Court recognized that FECA's contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. The Court explained:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. * * * In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application

precisely to the conduct of campaigns for political office.'" 424 U.S. at 14-15.[6]

Because "the use of funds to support a political candidate is 'speech' * * * 'at the core of our electoral process and of the First Amendment freedoms,'" the government bears the burden of proving that § 441a(d)(3)'s spending limitation is necessary to serve a compelling governmental interest and is narrowly tailored to that interest. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citation omitted); *Bellotti*, 435 U.S. at 786. That is a burden the government cannot meet.

A. Limiting party spending in connection with an election campaign does not serve to prevent corruption or the appearance of corruption.

The only interests that this Court has recognized as sufficiently compelling to justify limitations on a political organization's spending are the prevention of corruption and the prevention of the appearance of corruption. *See FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). These interests were deemed sufficient to justify the contribution limitations challenged on First Amendment grounds in *Buckley*, 424 U.S. at 26-38, but

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[6] The Court specifically cautioned that, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21.

they are not sufficient to justify the spending limit imposed by § 441a(d)(3).[7]

In upholding § 441a(d)(3), the Tenth Circuit purported to rest on the government's interest in preventing the reality or appearance of corruption. But the forms of "corruption" that the court identified — "domination" of party spending choices by incumbent officeholders, J.A. 47, and "*quid pro quos*" between current or potential office holders and their own political parties, J.A. 48 — have little or nothing in common with this Court's understanding of the concept of "corruption." Indeed, the concept of "corruption" invoked by the Tenth Circuit to justify restrictions on campaign spending strikes at the heart of our political system.

It is central to our political system that a candidate loyally will carry forward and champion the program of the candidate's political party — regardless of how much or how little the party spends to promote the candidate's election. That is how the system is supposed to work. On the other hand, a candidate is not presumed to be loyal to individuals or private entities. The danger of corruption arises from the possibility that individuals or entities will try to "purchase" loyalty not otherwise due, or seek "special favors" or "private" rewards.

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[7] The Court held in *Buckley* that political contributions could be restricted to "limit the actuality and appearance of corruption," 424 U.S. at 26, but invalidated limitations on "independent" expenditures because such limitations do not serve that purpose, *see id.* at 45; *see also id.* at 59-60 n.67. The Court expressly reserved the question whether FECA's limits on "coordinated" expenditures by state party committees in 2 U.S.C. § 441a(d) (previously codified as 18 U.S.C. § 608(f)), violate the First Amendment. *See id.*

The concept of an illicit "*quid pro quo*" assumes a candidate and individuals or groups whose interests are separate and distinct from those of the candidate, and upon whom the candidate, once elected, can bestow a "private" benefit. The interests of a candidate and his or her political party are not separate and distinct; for campaign spending purposes, the candidate and the party are one and the same, and the benefits the candidate can confer on the party are not "private."

There is no justification for treating a political party as distinct from the candidates it fields for office, and thus for characterizing its spending on behalf of its candidates as the equivalent of "contributions." Intra-party conflicts notwithstanding, the premise of our political system is that a candidate and the party are one and the same. The party *is* the candidate, and *vice-versa*. Spending by a party on behalf of its candidates is the functional equivalent of an expenditure by the candidate and may no more be restricted than other expenditures by the candidate.

It is ludicrous to suggest that a party can "corrupt" the political process by supporting its own candidates (or opposing candidates of other parties). Party activity supporting or opposing candidates *is* the "political process." From antiquity to the present, parties always have existed to enable party members to provide political support for party candidates in concert with the candidates' efforts to advance the party's interests, goals, platform, and agenda. The exchange of "political favors" between political parties and their candidates is so well established that the Court has enforced it in the electoral college. *See Ray* v. *Blair*, 343 U.S. 214 (1952) (a party may require its candidates for the electoral college, as a *quid pro quo* for the party's nomination as an elector, to pledge to vote automatically for whatever presidential ticket the party ultimately nominates).

The relationship between a political party and its candidates legitimately includes party funding for political advertisements in exchange for both tacit and overt promises from the party candidate. There is nothing in such exchanges that gives rise either to real or apparent corruption of the political process. Citizens organize in political parties to pool money and labor so that they may spend money to support candidates who in turn, once elected, will fulfill their promises by working to advance the party's program through legislation or executive branch action.

The touchstone of corruption is not influence *per se* but "improper" or "undue" influence, *Buckley*, 424 U.S. at 27, 53 & n.59 (quotation omitted); *Bellotti*, 435 U.S. at 789; not the securing of commitments from a candidate but the securing of "improper" commitments, *Buckley*, 424 U.S. at 47, the use of money for "improper" purposes, *id.* at 67. As the Court stated in *NCPAC*,

> "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." 470 U.S. at 497.

There is nothing "improper," "undue" or subversive of the political process about party influence. It would be nonsensical to view a party's spending on behalf of its own candidates as a form of "improper" influence. To be sure, a successful candidate is likely to use her power as an elected official to implement her party's platform. But in our system, it is assumed that she will do so; she is supposed to do so;

there is nothing "corrupt" about her doing so. The Tenth Circuit's concept of illicit "*quid pro quos*" between current or potential office holders and their own political parties makes no sense. When this Court referred to "post-election special favors that may be given in return" for contributions, *Buckley*, 424 U.S. at 67, it surely was not referring to a candidate's adherence to her party's platform.

Similarly, this Court's reference to "the danger of candidate dependence on large contributions," *id.* at 55, must be understood as a recognition of the potentially subversive effect of large individual or other *private* contributions, not as a suggestion that support provided by the candidate's own party poses a threat to the political process. Indeed, the Court has affirmed the legitimacy of using party resources in support of party candidates to "encourage candidate loyalty and responsiveness to the party." *DSCC*, 454 U.S. at 42.

Thus it would have been normal for the citizens of Colorado who heard Wirth Facts #1 to expect that it would help the eventual Republican nominee for the Senate, just as it would be normal to assume that the eventual Republican nominee would be a loyal Republican. Passing judgment on that normal political process is a matter that the First Amendment entrusts *exclusively* to the citizens. The First Amendment protects a state political party's right to spend funds without limitation to support its own candidates and to attack those of opposing parties.

Equally invalid is the Tenth Circuit's concept of "corruption" arising from "domination" of party expenditures by incumbent officeholders. The Tenth Circuit did not explain precisely what type of "domination" it had in mind, but presumably it contemplated the possibility that an incumbent, by virtue of her power over party spending, might exert "improper" influence over party nominees or prospective

nominees, or perhaps use her power over party spending to ensure her own renomination and reelection. Again, however, there is simply nothing "improper," and hence nothing "corrupt," about an incumbent's influence over the party machinery. One may or may not approve of such incumbent influence, but preventing such influence is not (and could not legitimately be) an objective of FECA.

Would it be "corrupt" for Speaker Gingrich to use his influence within the Republican Party to stymie the fund-raising efforts of Republicans who have repudiated the Contract With America? Would it be "corrupt" for President Clinton to steer clear of fund-raisers for Democrats who refuse to toe the Democratic Party line on affirmative action or abortion rights? Incumbents, no less than party leaders, may legitimately steer party resources to those candidates who are in tune with the party's positions on the issues of the day. There is nothing "corrupt" about it.

B. The other governmental interests identified by the Tenth Circuit are insufficient to justify limitations on political spending.

The Court of Appeals mistakenly suggested that § 441a(d)(3) could be justified under *Buckley* as serving to "'equalize the relative ability of all citizens to affect the outcome of elections'" and to "cap campaign costs and increase accessibility to our political system." J.A. 48 (quoting *Buckley*, 424 U.S. at 26). To the contrary, the Court has held that such interests are not legitimate, much less compelling.

1. Equalizing the relative influence of speakers is not a legitimate governmental interest.

In *Buckley*, the Court considered and *rejected* the contention that FECA serves a "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley*, 424 U.S. at 48. The Court firmly rejected any "equalizing" rationale for FECA:

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 424 U.S. at 48-49 (citations omitted).

In *Bellotti*, 435 U.S. at 790-91, and *Meyer* v. *Grant*, 486 U.S. 414 (1988), the Court again rejected the contention that encroachments on freedom of political speech are justified by a desire "to mute the voices of those who can afford to pay." *Meyer*, 486 U.S. at 426 n.7.

Indeed, because it limits spending only by political parties, the challenged spending limitation actually *promotes* inequality. Other groups as well as individuals remain free to make unlimited expenditures, so long as the expenditures are "independent." It can hardly be considered "equalization" when other groups and individuals may turn up the volume as much as they desire, while the party's voice is muted.

"Equalization" cannot plausibly be advanced as a justification for a legal regime that seeks to "equalize" no one besides parties. *See Bellotti*, 435 U.S. at 793.

2. Restricting speech as a means of capping campaign costs is not a legitimate governmental interest.

The Tenth Circuit also suggested that § 441a(d)(3) serves a governmental interest in capping the costs of political campaigns. J.A. 48. But this Court similarly turned aside the notion that government may restrict political speech "to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns":

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57.

Moreover, such cost-capping would have the perverse effect of driving contributions away from parties and toward political action committees, further eroding our party system. As a remedy for escalating campaign costs, this cure is surely worse than the disease.

In addition, because independent expenditures by others remain unlimited, the challenged spending limitation also does

not cap costs. Thus, even if the cost-capping justification for § 441a(d)(3) invoked by the Tenth Circuit were legitimate, § 441a(d)(3) would be fatally underinclusive in serving that interest. *See Bellotti*, 435 U.S. at 793.

C. The governmental interest held sufficient to prohibit the political use of corporate treasury funds does not apply here.

In *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), the Court, referring to a different type of "corruption in the political arena," upheld a state law that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, candidates in elections for state office. Under the state law at issue in *Austin*, corporations remained free to make such expenditures from segregated funds used solely for political purposes. *See id.* at 654-55.

The Court held that the challenged prohibition served to prevent "corruption in the political arena" resulting from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Party spending obviously does not present any danger of this type of "corruption" because the party accumulates wealth from citizens who *do* support the party's political ideas. Parties must rely on the popularity of their political agenda — not on any economic advantages that the corporate form may provide for investors — in order to attract contributions.

III. THE TENTH CIRCUIT'S CONSTRUCTION OF § 441a(d)(3) RENDERS THE STATUTE OVERBROAD AND IMPERMISSIBLY VAGUE.

A. The Tenth Circuit's Standard Is Overbroad.

Political speech is the lifeblood of the democratic process and, as such, receives the highest level of protection afforded by the First Amendment. As this Court has held, statutes that burden the exercise of political speech must be "narrowly tailored to serve a compelling state interest." *Austin*, 494 U.S. at 657 (citations omitted).

According to the Tenth Circuit, FECA's limits on political party expenditures serve the compelling interest in protecting the political process against the reality or appearance of corruption. "FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders.'" J.A. 48 (citation omitted). Assuming, *arguendo*, that some campaign-related speech by political party committees might threaten actual or apparent corruption, the limitation upheld by the Tenth Circuit sweeps in speech that could not possibly threaten such harm and therefore is overbroad.

According to the Tenth Circuit, all political party advertising that involves a "clearly identified candidate" and contains an "electioneering message" constitutes advertising "in connection with" a political campaign subject to the § 441a(d)(3) expenditure limits. Under the Tenth Circuit's test, a party political advertisement contains an "electioneering message" if a reasonable listener or reader would come away with the impression that the advertisement sought to garner or diminish support for a candidate.

In the real world, this means that virtually all party political advertisements that mention a candidate or an incumbent will contain an "electioneering message." As the current debate over term limits amply demonstrates, almost every incumbent member of the House of Representatives and most members of the U.S. Senate must be considered candidates from the day they first run for office until the day they announce their retirement from politics. Moreover, it is widely understood that a major purpose of political parties is the nomination and election of candidates.

It follows that virtually all political advertisements financed by a party committee will have — or at least be perceived to have — the purpose of promoting the election of the party's candidates and opposing the election of candidates from other parties.[8/] Applying the Tenth Circuit's test, it is difficult to imagine how a "reasonable listener" could fail to perceive an electioneering message in *any* party-sponsored advertisement that refers to a clearly identified candidate or potential candidate and discloses the name of the sponsoring party.[9/]

[8/] The Tenth Circuit's definition of an "electioneering message" includes messages that do not urge the reader to *vote* for or against a candidate but merely urge the reader to give or withhold *support* to the candidate. Thus, even if an advertisement somehow did not suggest that its readers should vote for a certain candidate, any suggestion that the reader should otherwise support that candidate — through contributions or volunteering, for example — could bring the advertisement within the Tenth Circuit's definition of an "electioneering message."

[9/] Indeed, the Tenth Circuit specifically identified as evidence of an electioneering message in Wirth Facts #1 the fact that the radio spot "included the notation of Republican Party sponsorship." J.A. 45. Wirth Facts #1 did not urge listeners to withhold election support for Wirth. All it said was that Wirth "doesn't have a right to change the facts." It could

(continued...)

As the Colorado Republicans have pointed out, many officeholders become candidates for reelection the day they take office, long before either party has even held a primary. Thus, under the Tenth Circuit's test, assuming that it was known or expected that the incumbent would seek reelection, § 441a(d)(3) would restrict the freedom of political parties to air such statements as "Colorado Republicans salute Congressman Joe Smith for his record of protecting Colorado's elk," "Colorado Democrats applaud Congresswoman Jane Doe's efforts in defense of abortion rights," "Colorado Republicans salute Congressman Doe for his vote to keep smut off the Internet."

The assertion that such a sweeping burden on political speech is "narrowly tailored" to any state interest, compelling or otherwise, is without merit. Moreover, no one could seriously contend that such purely political statements present the reality or appearance of a *quid pro quo* with a current or potential office holder. Consequently, the Tenth Circuit's standard for identifying speech uttered "in connection with" a political campaign is fatally overbroad.

B. The Tenth Circuit's Standard Is Impermissibly Vague.

Under this Court's precedents, the government must provide clear notice and guidance to participants in the political process when it seeks to regulate their First Amendment freedoms. As the Court has held:

[9/](...continued)
be viewed as calling upon Wirth to stop distorting the facts just as easily as it could be viewed as calling upon voters not to support him if he became the nominee.

> "[V]ague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to "steer far wider of the unlawful zone" * * * than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 U.S. at 41, n.48 (citations omitted).

See also Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

The Tenth Circuit's test for what constitutes an "electioneering message" renders § 441a(d)(3) impermissibly vague. By its terms, the test sweeps in almost every political statement by a party committee that mentions a candidate or an incumbent. It leaves the FEC and the courts the discretion to decide on a case-by-case basis what expression will fall outside the § 441a(d)(3) expenditure limits. Parties who wish simply to comply with the law receive no guidance, let alone the "fair warning" required by *Buckley*. To avoid breaking the law, political parties inevitably will "steer far wider of the unlawful zone" than they would have if the Tenth Circuit had adopted a clear standard.

The vagueness of § 441a(d)(3) as interpreted by the Tenth Circuit ensures its arbitrary enforcement. As discussed, according to the Tenth Circuit's own words, the § 441a(d)(3) expenditure limits would apply to virtually every party-sponsored political advertisement that mentions a candidate or an incumbent. As the facts in this case amply demonstrate, however, the FEC will not consistently apply § 441a(d)(3) in such a manner. In the spring of 1986, the Colorado Republicans aired three advertisements (including Wirth Facts #1) and published two pamphlets — all of which clearly

identified Congressman Wirth and criticized his honesty and his political positions. The Commission proceeded only against Wirth Facts #1 and, without further explanation, declined to proceed against the other anti-Wirth materials.

Under the Tenth Circuit's test for an electioneering message, any reasonable reader or listener could have concluded that all of these political advertisements were intended to diminish support for Congressman Wirth. Yet the Colorado Republicans would have needed a dowsing rod or a crystal ball to determine in the spring of 1986 which political advertisements would eventually be deemed subject to the expenditure limits in § 441a(d)(3). Consequently, under *Buckley*, § 441a(d)(3) — as interpreted by the Tenth Circuit — is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, § 441a(d)(3) violates the First Amendment. The judgment should be reversed.

Respectfully submitted,

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